a

NADARAJAN A/L SOMASUNDRAM

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR. AND NINE OTHER APPLICATIONS

b

HIGH COURT MALAYA, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CRIMINAL APPLICATION NO. 44-1-94]
26 MAY 1994

c d ***HABEAS CORPUS: Detention order made under s. 4(1) of Emergency (Public Order and Prevention of Crime) Order 1969 - Criminal Proceedings against the applicants jointly pending in Sessions Court - Whether detention order is based on the same second allegation of fact which forms the subject matter of criminal proceedings against applicants - Article 7(2) of Federal Constitution - Whether exposure to double jeopardy and conflict with constitutional guarantee - Designated police officer reported circumstances of arrest and detention to Minister under s. 3(3)(c) of Emergency (Public Order and Prevention of Crime) Order 1969 - Detention order made by Deputy Minister - Whether Deputy Minister has same power as Minister - Article 43A of Federal Constitution - Whether Deputy Minister acted in bad faith or mala fides - Burden on applicant to prove mala fides.***

In these cases, there were 10 applications for orders of *habeas corpus* and by consent of the parties, were argued together as some of the issues raised were common or overlapping as the case may be in all of them.

e

Criminal applications Nos. 44-1-94, 44-2-94 and 44-3-94 relate to the 1st applicant, the 2nd applicant and the 3rd applicant respectively, or the 3 applicants and the 3 applications collectively. In these applications, the Deputy Minister of Home Affairs made a detention order under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 in respect of each applicant directing that he be detained for a period of two years with effect from 14 December 1993 at the Rehabilitation Centre, Simpang Renggam, Johor, The grounds and the allegations of facts upon which the orders made were common to all three applicants except for the third allegation of fact, which differed in the case of the second applicant.

f

Held:

[1] In order for a person to avail himself of the protection given under Article 7(2) of the Federal Constitution, he must first be acquitted or convicted of an offence by a Court of competent jurisdiction and he must subsequently be charged for the same offence. In no other circumstances can a person claim the protection of that Article, and certainly not in a situation where he has been charged with an offence but has not been acquitted or convicted of that offence.

g

h **[2]** In these three applications, the facts upon which the charge in the criminal proceedings is based relate to different offence(s) from the allegation of fact forming part of the bases for the detention orders.

[3] There is no merit or substance at all on the contention that the detention order made by the Minister violates the provisions of Articles 5 and 7 of the Federal Constitution. Article 7(2) of the Constitution does not affect the position in any way as the discharge of an accused person is not an acquittal for the purpose of a plea of *autrefois acquit.* (Section 320(v) of the Criminal Procedure Code.)

i

[4] The order made by the Minister in respect of the applicant in the circumstances of this matter does not *ipso facto* amount to the exercise of his powers under s. 4(1) of the said Ordinance for ulterior purpose or purposes other than that mentioned in the detention order so as to vitiate and render it *mala fide*.

[5] The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *mala fides* and not mere suspicion. Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

[6] The detention orders were made in the valid exercise of a power conferred by the said Ordinance and the applicants have not succeeded in showing that the Deputy Minister had acted *mala fides* in the circumstances.

[7] In the light of the provisions in Article 43A(2) and the insertion by s. 3 of the Constitution (Amendment) Act 1983 (Act A566), it is crystal clear that the Deputy Minister is conferred with all the powers of the Minister under the said Ordinance including the power to sign the detention order as Deputy Minister as such power is necessary to enable the Deputy Minister to effectively assist the Minister in the discharge of his duties and functions.

[8] For the foregoing reasons, these three applicants have been legally detained pursuant to valid detention orders made by the Deputy Minister in the exercise of powers under s. 4(1) of the said Ordinance. The applicants have failed to establish that the orders are tainted with *mala fides* or otherwise made improperly or mechanically as would entitle them to the issue of orders of *habeas corpus*. In the circumstances, the three applications were dismissed.

Criminal Applications Nos. 44-231-91, 44-91-92, 44-7-93, 44-33-93, 44-5-94, 44-7-94, 44-9-94 ("the seven applications")

In these seven applications, the Deputy Minister of Home Affairs made a detention order under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 in respect of each applicant directing that he be detained at a place of detention for a period of two years. In some of the cases, the detention orders were extended for further periods of two years under s. 11A(1)(a)(aa) of the Act.

Held:

[1] The applicants in these seven applications have also been legally detained under valid detention orders made by the Deputy Minister in the exercise of powers under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.

[2] The applicants have failed to establish that they are entitled in the circumstances to the issue of orders of *habeas corpus*. Accordingly, the seven applications are dismissed.

Cases referred to:

Menteri Hal Ehwal Dalam Negeri & Anor. v. Lee Gee Lam & Another application [1993] 3 MLJ 673 ***(refd)***

Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs Malaysia & Ors. [1975] 2 MLJ 279 ***(refd)***

Public Prosecutor v. Musa [1970] 1 MLJ 101 ***(refd)***
Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors. [1988] 2 CLJ 274 ***(refd)***
Chin Chong Nang v. Menteri Hal Ehwal Dalam Negeri, Nalaysia dan Yang Lain [1991] 2 CLJ 1126 ***(refd)***
Wasudeo Anant Sohoni v. Emperor [1949] 50 Cr LJ ***(refd)***
Thakur Prasad Bania v. State of Bihar [1955] AIR SC 451 ***(refd)***
Karpal Singh v. Inspector-General of Police & Ors. [1989] 1 MLJ 185 ***(refd)***
Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. [1991] 1 MLJ 472 ***(refd)***
Re Tan Sri Raja Khalid bin Raja Harun, Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 ***(refd)***
Bhagat Singh v. Emperor [1931] AIR PC 111 ***(refd)***
Yeow Boon Kee v. Timbalan Menteri Dalam Negeri Malaysia & Anor. [1993] 2 MLJ 359 ***(refd)***

Legislation referred to:
Constitution (Amendment) Act 1983, s. 3
Constitution, Articles 7(2), 43A(2), 11th Schedule
Criminal Procedure Code, ss. 163, 165, 302(v), 303, 365(i)(b)
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(2)(c), 6(1), 11A(1)(a)(aa)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3)(c), 4(1), 7C
Evidence Act 1950, ss. 56, 74
Interpretation and General Clauses Ordinance 1948, s. 30
Penal Code, ss. 34, 380, 457
Criminal Procedure Code, ss. 8, 107, 491 (India)
Defence of India Rules, R. 26 (India)

For the applicants - Karpal Singh; M/s. Karpal Singh & Co.
For the respondents - Noorbahri bin Baharuddin, DPP

JUDGMENT

T. Selventhiranathan JC:
These ten applications for orders of *habeas corpus* were, by consent of the parties, argued together as some of the issues raised are common or overlapping as the case may be, in all of them.

Criminal applications 44-1-94, 44-2-94 and 44-3-94 ("the first applicant" , "the second applicant" and "the third applicant" respectively, or "the three applicants" and "the three applications" collectively)

The Deputy Minister of Home Affairs made a detention order under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ["the Ordinance"] in respect of each applicant directing that he be detained for a period of two years with effect from 14 December 1993 at the Rehabilitation Center, Simpang Renggam, Johor. The grounds and the allegations of fact upon which the orders were made were common to all three applicants except for the second applicant.

The grounds and the allegations of fact upon which the respective detention orders were based were as follows:

The first applicant

Alasan-alasan yang atasnya perintah itu dibuat

Kamu adalah seorang ahli kumpulan haram yang melakukan kegiatan jenayah kekerasan di mana tindakan kamu itu telah menjejas dan menudaratkan ketenteraman awam.

Tuduhan-tuduhan yang perintah itu berasakan

Bahawa kamu adalah seorang ahli yang aktif dalam gang Mafia yang bergerak di kawasan Jalan Petani, Pulau Pinang di mana kamu terlibat dalam kegiatan jenayah kekerasan seperti berikut:

1. Bahawa kamu adalah seorang ahli yang cergas dalam gang Mafia yang terlibat dalam kegiatan jenayah di sekitar kawasan Petani Road, Pulau Pinang.
2. Bahasa kamu pada 12 September 1991 bersama-sama dengan 5 (lima) orang ahli gang Mafia telah melakukan pecah rumah di No. 7 Lorong Kelawai, Pulau Pinang di mana dalam kejadian tersebut menyebabkan seorang perempuan cina telah terbunuh.
3. Bahawa kamu pada 22 Februari 1992 jam lebih kurang 11.00 malam bersama-sama dengan 15 orang lelaki India telah menyerang dan mencederakan seorang anggota polis sukarelawan di tempat berhampiran dengan No. 47A Jalan Mohd Khan, Pulau Pinang.

The second applicant

Alasan- alasan yang atasnya perintah itu dibuat

Kamu adalah seorang ahli kumpulan haram yang melakukan kegiatanjenayah kekerasan di mana tindakan kamu itu telah menjejas dan memudaratkan ketenteram awam.

Tuduhan-tuduhan yang perintah itu berasakan

Bahawa kamu adalah seorang ahli gang Mafia yang bergerak di kawasan Lines Road, Petani Road dan Kg Jawa Bharu, Pulau Pinang di mana kamu terlibat di dalam kegiatan jenayah kekerasan seperti berikut:

1. Bahawa kamu adalah seorang ahli gang Mafia yang terlibat dalam kegiatan jenayah di sekitar kawasan Lines Road, Petani Road dan Kg Jawa Bharu, Pulau Pinang.
2. Bahawa kamu pada 12 September 1991 jam lebih kurang 4.18 pagi bersama-sama ahli gang Mafia telah menyerang satu perempuan cina semasa melakukan pecah rumah menyebabkan perempuan tersebut terbunuh.
3. Bahawa kamu pada 21 April 1993 jam lebih kurang 6.45 pagi bersama-sama dengan empat lelaki lain telah melakukan samun wang tunai sebanyak RM22,456 di pejabat Star Publications (M) Bhd. yang beralamat di No 15 Jalan Masjid Kapitan Keling, Pulau Pinang.

The third applicant

Alasan-alasan yang atasnya perintah itu dibuat

Kamu adalah seorang ahli kumpulan haram di mana tindakan kamu itu telah menjejas dan memudaratkan kententeraman awam.

Tuduhan-tuduhan yang perintah itu berasaskan

Bahawa kamu adalah seorang ahli yang aktif dalam gang Mafia yang bergerak di kawasan Jalan Petani, Pulau Pinang di mana kamu terlibat dalam kegiatan jenayah kekerasan seperti berikut:

1. Bahawa kamu adalah seorang ahli yang cergas dalam gang Mafia yang terlibat dalam kegiatan jenayah di sekitar kawasan Petani Road, Pulau Pinang.
2. Bahawa kamu pada 12 September 1991 jam lebih kurang 4.18 pagi bersama-sama ahli gang Mafia telah menyerang seorang perempuan cina semasa melakukan pecah rumah menyebabkan perempuan tersebut terbunuh.
3. Bahawa kamu pada 22 Februari 1992 jam lebih kurang 11.10 malam bersama-sama dengan 15 orang lelaki India telah menyerang dan mencederakan seorang anggota polis sukarelawan di tempat berhampiran dengan rumah No 47A Jalan Mohd Khan, Pulau Pinang.

Encik Karpal Singh for all three applicants submitted that the second allegation of fact on which the detention order in respect of each applicant was based also formed the subject-matter of criminal proceedings against them jointly in the sessions Court at Penang ***vide*** arrest case 83-657-93, which had not yet been disposed of, and that their detention in the circumstances exposed them to double jeopardy, ie that it was tantamount to prosecuting them twice in respect of the same offence. This was in conflict with the protection guaranteed under Article 7(2) of the Constitution.

He submitted further that the Deputy Minister had acted in a cavalier manner in making the detention orders in question while criminal proceedings were still afoot in a Court of law in respect of the same facts which constituted the second allegation, and the applicants therefore could not be made the subject of parallel detention orders under the ordinance. This showed *mala fides* or bad faith on the part of the Deputy Minister. Where *mala fides* was shown, it was in order for the Court to question the exercise of the power of detention by the Deputy Minister and consequently to interfere in the circumstances by subjecting his action to judicial review. He submitted further that the Deputy Minister had not considered the pending prosecution of the applicants in a Court of law when making the detention orders, which showed the absence of care on his part and the improper exercise of the power of detention by him. It was submitted that if one of the allegations of fact upon which the detention orders were based was defective, then the whole detention was void.

In support of the contention that the Deputy Minister applied his mind mechanically in making the detention orders, Encik Karpal Singh cited *Menteri Hal Ehwal Dalam Negeri & Anor. v. Lee Gee Lam and another application* [1993] 3 MLJ 673. He also referred to the decision in *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs Malaysia & Ors.* [1975] 2 MLJ 297 and sought to distinguish it from these three applications on the ground that the criminal proceedings in the Sessions Court against the three applicants here are still ongoing whereas in *Yeap Hock Seng* they had come to end. *Yeap Hock Seng* was therefore not relevent. He also referred to *Public Prosecutor v. Musa* [1970] 1 MLJ 101 but distinguished it on the ground that it involved the making of a detention order which was followed by a restriction order.

The other ground of challenge of the detention orders was that the designated police officer reported the circumstances of the arrest and detention of the applicants to the Minister pursuant to s. 3(3)(c) of the Ordinance whereas the detentation orders were

made by the Deputy Minister. He submitted that the detention orders should have been made by the Minister himself and not by the Deputy Minister. Comparison was made with criminal with applications 44-7-93 where the report was directed to the Minister and the detention order was also made by him, he being the correct authority to do this.

Deputy Public Prosecutor Noorbahri bin Baharuddin submitted on behalf of the respondents that the burden was on the applicants to prove *mala fides* on the part of the Deputy Minister in the exercise of his powers under the Ordinance and that the burden was a very heavy one. The ordinary criminal laws and the laws relating to preventive detention involved two separate areas of laws which operated independently of each other. He relied on the decision in *Yeap Hock Seng* to support this contention and submitted that the arrest and detention of the applicants under the Ordinance was a separate and distinct from of action taken against them which was different from their prosecution under the ordinary criminal law. The existence of even two parallel detention orders, as was the case in *Lee Gee Lam*, did not lead to the conclusion that the Deputy Minister had acted *mala fide*.

In relation to the contention that the detention orders should have been made by the Minister and not by the Deputy Minister, he argued that it was immaterial whether the respective reports under s. 3(3)(c) of the Ordinance were submitted the designated police officer to the Minister or the Deputy Minister because the latter has the same powers as the Minister pursuant to Article 43A of the Constitution see *Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors.* [1988] 2 CLJ 274, and *Chin Chong Nang v. Menteri Hal Ehwal Dalam Negeri Malaysia dan Yang Lain* [1991] 2 CLJ 1126

I shall now deal with the grounds upon which the detention orders are challenged. The submission in relation to the exposure of the three applicants to double jeopardy by reason of their being detained under the Ordinance second allegation on fact which also formed the basis of criminal proceedings in Court against them is interesting and as suggested by Encik Karpal Singh, seeks to break new ground. However, in my view the facts do not disclose a situation of the three applicants being subjected or exposed to double jeopardy within the meaning if Article 7(2) of the Constitution. The exact nature of the offence(s) with which they are charged in the criminal proceedings was not disclosed in the applications and neither did the learned Deputy Public Prosecutor advert to them in his submission. However, I have taken the liberty of procuring the charge-sheet in respect of the criminal proceedings brought against the applicants in the Sessions Court. That charge-sheet reveals that they are jointly charged with the offence of house breaking by night with the intention of committing an offence punishable under s. 457 read with s. 34 of the Penal Code. They are jointly charged in the alternative with committing the offence of theft in a building used as a human dwelling under s. 380 read with s. 34 of the Penal Code.

The charge and the alternative charge are reproduced below for purposes of comparison with the impugned second allegation which formed part of the allegations of facts on which the detention orders were based:

Pertuduhan

Bahawa kamu bersama-sama pada 12 September 1991 jam lebih kurang 0500 hours di rumah 7 Lorong Kelawi, di dalam Daerah Georgetown, dalam Negeri Pulau Pinang telah melakukan pecah rumah pada waktu malam hari dengan memasuki ke dalam bangunan kepunyan Ewe Sim Geok (P) kad pengenalan

0286999 yang digunakan sebagai tempat kediaman manusia, selepas matahari jatuh dan sebelum matahari keluar, dengan hendak melakukan kesalahan yang boleh dihukum di bawah s. 457 Kanun Keseksaan dan dibaca bersama di bawah Akta 34 Kanun yang sama.

Tuduhan pilihan

Bahawa kamu bersama-sama pada 12 September 1991 jam lebih kurang 0500 hours di rumah 7 Lorong Kelawai, di dalam Daerah Georgetown, dalam Negeri Pulau Pinang, telah melakukan kecurian dalam bangunan yang digunakan sebagai tempat kediaman manusia dengan mengambil barang-barang seperti di lampiran 'A' yang dipunyai oleh seorang nama Ewe Sim Geok (P) kad pengenalan 0286999, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum dibawah s. 380 Kanun Keseksaan dan dibaca bersama di bawah Akta 34 Kanun yang sama.

I make no comment on the language employed in the drafting of the charge and alternative charge (which are reproduced above as they actually stand) as to whether they accord correctly with s. 457 and 380 of the Penal Code. However lampiran 'A' in the alternative charge consisting of two sheets of foolscap paper showed a very lengthy list of valuables allegedly stolen.

A scrutiny of the charge and alternative charge and comparison with the second allegation of fact in the grounds upon which the detention orders were based show that the second allegation was in respect of an attack on a female Chinese which resulted in her death. On the other hand, the charge and alternative charge were in respect of the offences of house-breaking and theft by night, and theft in a building used as a human dwelling, under s. 457 and 380 of the Penal Code respectively read with s. 34 thereof. Therefore, it is crystal clear that the charge and alternative charge in the criminal proceedings are in respect of different offences and would necessarily be based on facts which are distinct from the facts the second allegation of causing the death of the female Chinese which *inter alia* formed part of the bases of the grounds upon which the detention orders were made. Even if the three applicants are charged in the same or subsequent criminal proceedings with causing the death of the female Chinese in addition to the charge and alternative charge that they face, they would not be able to claim the protection provided by Article 7(2) of the Constitution against being exposed or subjected to double jeopardy. This additional charge would properly lie together with the pending charge (s) by virtue of s. 163 of the Criminal Procedure Code ("the CPC"). That section provides that there shall be a separate charge for every distinct offence of which any person is accused. See also s. 165 of the CPC which provides for a person to be charged with and tried in respect of more offences than one committed in one series of acts so connected together as to form the same transaction, and in relation to the acts alleged constituting an offence falling within two or more separate definitions of the law and the person accused of them being charged with and tried at one trial for each of such offences.

Article 7(2) of the Constitution reads as follows:

> A person who has been acquitted or convicted of an offence shall not be tried again for the **same offences** (emphasis mine) except where the conviction or acquittal has been quashed and a retrial ordered by a Court superior to that by which he was acquitted or convicted.

In the first place a person can plead *autrefois acquit* or *autrefois convict* in subsequent criminal proceedings only where he is tried again for **the same offence** of which he has been acquitted or convicted on the ground that the subsequent criminal proceedings put him under jeopardy twice for **the same offence.** However, he cannot so plead in subsequent criminal proceedings where he is tried for a **different offence** (emphasis mine) from that of which he was acquitted or convicted in earlier criminal proceedings, albeit based on the same facts or on facts arising from one series of acts so connected together as to form the same transaction. In the second place, a person cannot plead *autrefois acquit* or *autrefois convict* in subsequent criminal proceedings where he had been acquitted or convicted of an offence in earlier criminal proceedings which have come to an end, even if he is charged with the same offence in the subsequent criminal proceedings. For a person to avail himself of the protection given under Article 7(2), he must first be acquitted or convicted of an offence by a Court of competent jurisdiction and he must subsequently be charged for the same offence. In no other circumstance can he claim the protection of that Article, and certainly not in a situation where he has been charged with an offence but has not been acquitted or convicted of that offence.

Sections 302 and 303 of the CPC amplify further the circumstances in which the protection of Article 7(2) can be invoked and those in which the protection would not be available. For the present purpose, illustration (b) to s. 302 is most apt:

> A is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

That being the case where criminal proceedings only are concerned, it would be more so where the allegation of fact on which the detention order is based is distinct and separate from the offence(s) with which the person is charged in the criminal proceedings. In my view the very language of Article 7(2) leaves out from the penumbra of its protection a hybrid situation where a person is charged with an offence in criminal proceedings while at the same time action is taken against him under the Ordinance (or any other law relating to preventive detention for that matter), even if the facts upon which such actions is taken are the same as those upon which the charge in the criminal proceedings is based. It would be more so where as in these three applications, the facts relate to different offence(s) in the criminal proceedings from the allegations of fact forming part of the bases for the detention orders.

Unfortunately this aspect of the non-according of protection against double jeopardy in the wider sense by Article 7(2) was not canvassed before me as the arguments proceeded on the basis that the facts related to the same offence(s) in the criminal proceedings as the impugned second allegation of fact. But this by itself is a sufficient answer to the objection raised of exposure to double jeopardy in the making of the detention orders.

However, in deference to the arguments advanced on behalf of the parties on the question of whether the Deputy Minister acted *mala fid*e in making the detention orders on the assumption that the charge(s) in relation to the offence(s) allegedly committed in the criminal proceedings and the impugned second allegation are the same and also in the event that an appellate Court may conceivably disagree with my reasoning in relation to the interpretation of the extent of the protection accorded by Article 7(2), I shall now proceed to consider the arguments advanced that the Deputy Minister acted *mala fide* in making the detention orders.

Encik Noorbahri argued that the Deputy Minister did not so act as two different types of law were involved, ie the ordinary criminal law and a preventive detention law, which were distinct and separate from each other, and action could be validly taken under one independently of the other.

In my view there is authority for upholding that proposition. Although *Yeap Hock Seng* was a case where the detention order was served after the applicant there had ceased to face criminal proceedings, it is observed that the order was made by the minister on 12 August 1975 during the currency of the criminal proceedings which ended on 20 August 1975. In a judgment which dealt fully with the subject, Abdoolcader J. [as he then was] posed the question for determination as follows at page 282 of the report:

> The question for determination therefore resolves into whether the applicant's detention culminating as an aftermath in these circumstances is in affect a mala fide and improper exercise of the powers of detention vested in the minister under s. 4(1) of the ordinance. There does not seem to be any local authority on this point and both Counsel agree that this question is res integra in Malaysia but there are some pertinent India decisions which I shall to discuss.

He then went on to discuss a cantenation of Indian cases on the subject and I quote from his judgment at pages 283-285 of the report those that are relevant for the present purpose and the conclusions drawn:

> In *Thakur Prasad Bania v. State of Bihar* AIR [1955] SC 451, a case in which preventive detention orders were passed while criminal proceedings against the petitioners were in the initial stages, the Supreme Court held that where the grounds of detention are not wholly the same as the facts in respect of which the prosecution was launched and the proceedings under s. 170 of the former Indian Criminal Procedure Code were initiated, the contention that the detention is in respect of the very same matter for which the prosecution was launched and that the detention is in the nature of interference with the course of justice and therefore *mala fide* is not sustainable. There is a *dictum* in the judgment in that case to the effect that:
>
> > It may be that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, the order of detention may amount to abuse of the statutory powers. But this does not mean that such an order is necessarily *mala fide.* Such a circumstance calls for scrutiny as to the *bona fides* of the detention order but the question of *mala fides* has got to be decided as one of fact with reference to all the circumstances of an individual case.
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> In *Priyatosh Mazumdar v. State of West Bengal* AIR [1963] Cal 589, the High Court of Calcutta held that the fact that there are parallel proceedings in existence one in Court and the other by way of detention, does not by itself vitiate the order of detention. It further held that an allegation of bad faith is quite easy to make but very difficult to substantiate, and that the mere circumstance that some of the particulars in the case related to facts which formed the basis of prior unsuccessful criminal proceedings would not necessarily lead to the inference that there was bad faith on the part of the detaining authority the Court would require very much than that to hold that bad faith was established.
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> …
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> *Sahib Singh Dugal v. Union of India* AIR [1966] SC 340 held in effect that where it may not be possible to obtain a conviction for a particular offence, the authorities may still be justified in ordering detention of a person in view of his past activities which will be of a wider range than the mere proof of a particular offence in a Court of law.
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> …

[The Supreme of India reaffirmed] ... in *Mohd Salim Khan v. Shri CC Bose* AIR [1972] SC [1670] that the mere fact that criminal proceedings in connection with the same incidents had been adopted against the petitioner and had been discharged by the trying Magistrate does not mean that no valid order of detention could be passed against him in connection with those very incidents or that such an order could for that reason be characterised as *mala fide.*

...

In *Masood Alam v. Union of India* AIR [1973] SC 897, the Supreme Court, applying Sahib Singh Dugal, held that the fact that the objectionable activities mentioned in the grounds for detention also attract the provisions of Chapter 8 of the Indian Criminal Procedure Code [Chapter 7 of our Code relating to security for keeping the peace and for good behaviour] does not by itself make the preventive detention illegal or *mala fide* if the grounds are germane and relevant to the object of the statute in question. Merely because such jurisdiction of the Courts can also be validly invoked does not by itself exclude the jurisdiction of preventive detention under the relevant statute. This case also decided there is no legal bar in serving an order of detention on a person already in custody if he is likely to be released soon thereafter and there is relevant material on which the detaining authority is satisfied that if free, the person concerned is likely to indulge in prejudicial activities contemplated by the detention law.

It is therefore abundantly clear that there is over- whelming persuasive authority, with which I have no reason to disagree [and the authorities I have adumbrated on this point are by no means exhaustive], that the order made by the minister in respect of the applicant in the circumstances of this matter does not *ipso facto* amount to the exercise of his powers under s. 4(1) of the ordinance for ulterior purposes or purposes other than that mentioned in the detention order so as to vitiate and render it *mala fide.* The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *mala fides* and not mere suspicion.

It might perhaps be open to the applicant to suggest that the circumstances surrounding his case might possibly reflect some suspicion of *mala fides* but this cannot be taken for granted or considered sufficient proof by itself. It is my considered view that the the object and in s. 4(1) so wide as to negate any right in the applicant in the circumstances of his case to demand that the grave question of his quilt or innocence on the tentative charge if murder should be left to the Court and the juri-box as the sanctuary of his life and liberty and not submerged in the amplitude of preventive detention conceived in the mind of the minister or perhaps animated in his breast within the purview of the prescribed statutory provision on relevant grounds. Mere circumvention to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

...

The second matter is the contention that the detention order made by the minister violates the provisions of Articles 5 and 7 of the Constitution. I find no merit or substance at all in this argument. Article 7(2) of the Constitution does not affect the position in any way as the discharge of an accused person is not an acquittal for the purpose of a plea of *autrefois acquit* (s. 302(v) of the Criminal Procedure Code)...

In any event the acquittal of an accused person does not necessarily mean that he cannot be acting in a manner prejudicial to the purpose set out in s. 4(1) of the Ordinance. The ordinary criminal laws of the country and the Ordinance are not substitutes for each other but are complementary. The constitutional protection against double jeopardy embodied in Article 7(2) of the Constitution and the principle of *autrefois acquit* and *convict* enacted

> in s. 302 of the Criminal Procedure Code cannot be applicable as satisfaction under the Ordinance is not a prosecution or trial. Indeed the very essence of preventive detention is incarceration without the benefit of a prosecution or trial and with no offence proved nor any charge formulated or preferred. There is and can be no identity of offence or of prosecution between detention under the Ordinance and a conviction upon trial by a Court of law. An order of detention under the Ordinance is not therefore illegal merely because it nullifies a previous order of discharge or acquittal by a Court in a criminal case. [*Raman Lal Rathi v. Commissioner of Police, Calcutta* AIR 1952 Cal 26, *Dharamdas Shyamlal v. District Magistrate, Ahmedabad* AIR 1960 Cuj 430].

I would, with respect, adopt and apply the law as discussed in *Yeap Hock Seng* for the present purpose and hold that the detention orders are made in the valid exercise of a power conferred by the Ordinance and the applicants have not succeeded in showing that the Deputy Minister acted *mala fide* in the circumstance.

As for the objection raised that the report of the circumstances of the arrest and detention was forwarded in each case to the Minister but that it was the Deputy Minister who made the detention order and that it should have been made by the Minister. I find that the objection is without merit.

Article 43A(2) of the Constitution provides that "deputy ministers shall assist ministers in the discharge of their duties and functions, and for such purposes shall have all the powers of ministers". The comma and the words " and for such purposes shall have all the powers of ministers" which appear after the word "functions" in the Article were inserted by s. 3 of the Constitution (Amendment) Act 1983 (Act A566) which came into force on 16 December 1983. The amendment was clearly intended to overcome the administrative difficulties faced previously which curtailed the ability of Deputy Ministers to fully assist Ministers in the discharge of their duties and functions. In addition to this provision, s. 30 of the Interpretation and General Clauses Ordinance 1948, which is incorporated in the Eleventh Schedule to the Constitution, provides as follows:

> 30 Construction of enabling words:
>
> Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

In the light of these two provisions in the Constitution, it is crystal clear that the Deputy Minister is conferred with all the powers of the Minister under the Ordinance including the power to sign the detention order as Deputy Minister as such power is necessary to enable the Deputy Minister to effectively assist the Minister in the discharge of his duties and functions.

On 23 May 1994, after these grounds of judgment had been prepared in advance in draft, Encik Karpal Singh submitted a written reply (after the deadline set for 14 May 1994 to do so) in answer to Encik Noorbahri's written submission. In order that the main point of law raised in these three applications should be fully ventilated, I extended the deadline set to consider the reply.

Encik Karpal Singh referred to s. 365(i)(b) of the Criminal Procedure Code which reads:

365.The High Court may whenever it thinks fit direct:

> (i) that any person who

(a) ... ; or

(b) is alleged to be illegally or **improperly** detained in public or private custody within the limits of the Federation.

be set at liberty (emphasis his),

and submitted that that provision further requires this Court to consider whether the three applicants have been **improperly** deprived of their liberty. Accordingly, and I quote from his submission, "a detention may be legal but yet **improper** and, therefore, amenable to an order of *habeas corpus* being issued if the said detention is in contravention of the provisions of s. 365(i)(b). He cited the decision of the Nagpur High Court in *Wasudeo Anant Sohoni v. Emperor* 50 CR LJ 1949 at p. 165 in support of this contention. He submitted that the Court there had held that the word "improperly" in the phrase "illegally and improperly" in s. 491 of the Indian CPC (which is in *pari materia* with s. 365 of the Malaysia CPC) referred "only to those cases in which although forms of law have been observed, there has been a fraud on an Act or **an abuse of the powers** given by the legislature." In his view, there cannot be parallel pending criminal proceedings in Court and use of the same ground to invoke the power of preventive detention under s. 4(1) of the Ordinance. On the authority of *Wasudeo Anant Sohoni* this would amount to an abuse of power given by the legislature to the Minister, and "... the legislature could not have intended that there be pending criminal proceedings in respect of a ground to be used for preventive detention of the subject in question".

He submitted that although Abdoolcader J. (as he then was) had referred in *Yeap Hock Seng* to the following dictum of the Indian Supreme Court in *Thakur Prasad Bania*:

> It may be that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, the order of detention may amount to abuse of the statutory powers. But this does not mean that such an order is necessarily *mala fide.* Such a circumstance calls for scrutiny as to the *bona fides* of the detention order but the question of *mala fides* has got to be decided as one of fact with reference to all the circumstances of an individual case.

the learned Judge did not consider the import of the word "**improperly**", and invited me to consider the matter afresh. In *Thakur Prasad Bania,* the Indian Supreme Court had accepted that there may be a situation where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, and in such a situation **the order of detention may amount to an abuse of the statutory powers** (emphasis his) which is in line with the principle in *Wasudeo Anant Sohoni* in view of the word "**improperly**" used in s. 491 of the Indian CPC. As the liberty of the subject was involved, s. 365(i)(b) of the CPC ought to be given a strict interpretation: *Karpal Singh v. Inspector-General of Police and Ors.* [1989] 1 MLJ 185, and *Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1991] 1 MLJ 472.

The arguments raised in Encik Karpal Singh's reply, with respect, cannot be sustained. As I have stated earlier in this judgment, the offence(s) with which the three applicants are charged in the criminal proceedings **are not the same** (emphasis mine) as the second allegation of fact which formed part of the bases upon which the detention orders were made, although they were indubitably comprised in one series of acts so connected together as to form the same transaction within the meaning of s. 165 of the CPC. Arraignment on separated charges in respect of each of the offences in the circumstances would have been perfectly in order for the purposes of criminal proceedings. That being so, the same should be, and is, true of the hybrid situation that arises for decision in these

three applications. The charge(s) in the criminal proceedings are not repeated in the impunged second allegation of fact **so as to attract the sanction of Article 7(2) of the Constitution even if the whole matter arose in criminal proceedings only** (emphasis mine).

Having so concluded, the act of the Deputy Minister in making the detention orders cannot be questioned further as the same is beyond the pale of challenge on any question save in regard to a question on compliance with any procedural requirement in the Ordinance governing that act, see s. 70 of the Ordinance.

I have not found it necessary for the purposes of this judgment to consider whether the argument that the Deputy Minister acted mechanically in making the detention orders was not in fact an adroit attempt to convert a substantive objection based on the subjective exercise of discretion by the Deputy Minister (the raising of which objection is prohibited by s. 70) into an adjectival or a technical objection based on non-compliance with a procedural requirement in the Ordinance (the raising of which objection is permitted as an exception to that section) so as to bring the matter within the ambit of the decision of the Supreme Court in *Lee Gee Lam*. The respondents appeared to accept the argument so advanced on behalf of the applicants by contending that they have not shown that the Deputy Minister acted *mala fide* in the circumstances, and I therefore leave that question open.

I am aware that this aspect of my judgment, i.e. that the impugned second allegation of fact and the charge(s) in the criminal proceedings being not the same, was not raised in argument before me by the parties and may be open to the criticism that it amounts to the Court itself examining the subjective satisfaction of the Deputy Minister in making the detention orders. My answer to this has a two-fold basis.

Firstly, as the attack on the detention orders was predicated upon the existing charge(s) in the criminal proceedings, it was open to me to have sight to those charge(s) as the charge-sheet is a public document within the meaning of s. 74 of the Evidence Act 1950, and of which I can take judicial notice under s. 56 of that Act. In fact, the parties themselves should have produced the charge-sheet in the criminal proceedings to enable the Court to arrive at a correct decision on the law as applied to the facts.

Secondly, I compared the charge(s) in the criminal proceedings with the impugned second allegation of fact from a purely jurisprudential aspect without for one moment considering the evidence in support thereof, to which in any case I did not have access. I had to make this comparison in order to see if the contention of the applicants being exposed or subjected to double jeopardy in the hybrid situation obtaining was made out. Only then would I be able to consider whether there was indeed on the face of it any basis for the contention that the Deputy Minister had acted mechanically without applying his mind to the matter in hand when he made the detention orders. Having viewed the charge-sheet, I could not find any support to sustain that contention.

However, even if the impugned second allegation of fact were the same as the offence(s) with which the applicants were charged in the criminal proceedings, I am of the view that that by itself would not show *mala fides* on the part of the Deputy Minister as the impugned second allegation of fact is not the sole fact upon which the detention orders were grounded. The first and third allegations of facts relate to other aspects of the activities of the applicants upon which the detention orders were also grounded. Taking the allegations of facts collectively, it cannot be said on the face thereof that the Deputy

Minister had acted mechanically in making the respective detention orders. The Court cannot go behind the detention orders to question the sufficiency of the facts upon which they were made, even more so where the applicants themselves have chosen not to make any representations to the advisory board thereby shutting themselves out from a possible avenue of access to the evidence levelled against them which might have aided them in these proceedings. The Court can only look at the facts to the extent that they are disclosed and cannot go behind them: see the last paragraph of the judgment of the Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun, Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at page 188 of the report.

I am afraid that the very case upon which Encik Karpal Singh relied so heavily in his reply militates against his arguments. In *Wasudeo Anant Sohoni*, Hidayatullah J. commented thus on the law at page 168 of the report:

> ... After the decision of their lordships of the Privy Council in *Bhagat Singh v. Emperor* AIR 1931 PC 111, the Courts are precluded from going behind the opinion of a person so empowered (i.e. to act on satisfaction) and this is true of proceedings in the nature of *habeas corpus* unless there is a question of identity, or manifest fraud upon the statute or the power conferred by the statute is utilised for some indirect purpose not connected with the objects of the Act or the mischief it seeks to remedy.

He then went on to discuss a number of authorities before applying the law to the facts of that case at pages 171-172 of the report:

> ... Now the object of the section is not penal but merely preventive. A person may not have acted up to the moment of his detention in the manner sought to be prevented but if there is a likelihood of his so acting action can be taken against him. We have accordingly to see whether the Provincial Government has satisfied itself on one or the other or both before taking action. In this connection the order and the return *prima facie* raise a presumption that everything is in order. In the present case the only defect pointed out in the order was the use of the words 'and' in the preamble of the order which reads as follows:
>
> > Whereas the Provincial Government are satisfied that S.A. Sohoni of Akola has been acting and is likely to act in a manner prejudicial to the public safety, order and tranquillity etc.
>
> It was argued that the Act uses the word 'or'. As regards the second 'and' we think nothing turns upon it because the 'acting' can be prejudicial to the public safety as well as order and tranquillity. The first 'and' does admit of some argument especially as the Provincial Government's return does not deny that Mr. Sohoni was law-abiding till the date of his arrest. But being law-abiding is one thing and not acting in a manner prejudicial to the safety etc. is quite another. Many a rumour-monger and many a person indulging in reckless talk may keep out of the clutches of (the) law and yet act in a manner prejudicial to the public safety, order or tranquillity. The matter is cleared by the return and the grounds of detention which show that his membership of the R.S.S. (a proscribed association) is in mind. We may also point out that in *Sibnath Banerji's* case AIR 1943 FC 75. Zafrulla Khan J. made a point of the use of the word 'or' and animadverted against those orders which used this word. According to the learned Judge this showed a mechanical reproduction of the words of the rule (R. 26 of the Defence of India Rules). In this view the learned Chief Justice of India did not concur. There are two English cases in which the opinion of the learned Chief Justice finds support and the order passed in *Green's* case [1942] AC 284 used the word 'or'. We do not, therefore, think that this point is so substantial as to entitle the detenu to an immediate release.

> This brings us to the grounds of detention and particulars supplied to the detenu. It is to be remembered that the grounds are not given to justify the detention but to afford the detenu a chance to make a representation. Their purpose is limited though being a document vitally connected with the reasons of detention it forms an important piece of evidence. In the grounds supplied in this case, it is clearly stated that the main reason for Mr. Sohoni's detention is his intimate connection with the R.S.S. and that the R.S.S. is capable of violence towards the leaders of other political organisations. No facts are disclosed though it is in a way suggestive that the action followed immediately after the assassination of a great leader. **We are not entitled to conjecture anymore than the detenu** (emphasis mine)... As we have said above, we are not entitled to conjecture why the R.S.S. was declared an unlawful association, what material the Government acted upon, and how that body of individuals is capable of violence because these matters are within the ken of the Provincial Government and are not known to us. We know from the return that the Provincial Government satisfied itself and the settled law in this country does not allow us in such circumstances to ask the Provincial Government to disclose to us all the materials and information on which the action was taken. **The petitioner cannot shift the onus from himself by merely asserting in a general way that there are no grounds. Nor does such assertion constitute proof of fraud or indirect motive** (emphasis mine).

Similarly, having regard to the grounds and allegations of facts upon which the detention orders are based, it cannot be said that the Deputy Minister acted improperly or mechanically in making the orders. The applicants have not alleged facts tending to show that he so exercised his powers, apart from any question of his perpetrating a manifest fraud upon the Ordinance or utilising the power conferred by it for some indirect purpose not connected with its objects or the mischief it seeks to remedy within the test laid down by the Privy Council in *Bhagat Singh* and elaborated in *Wasudeo Anant Sohoni*.

For the foregoing reasons, I hold that these three applicants have been legally detained pursuant to valid detention orders made by the Deputy Minister in the exercise of powers under s. 4(1) of the Ordinance and that they have failed to establish that the orders are tainted with *mala fides* or otherwise made improperly or mechanically as would entitle them to the issue of orders of *habeas corpus*. In the circumstances, the three applications are dismissed.

Criminal applications 44-231-91, 44-7-93, 44-33-93, 44-5-94, 44-7-94 and 44-9-94 ("the seven applications")

In these seven applications, the Deputy Minister of Home Affairs made a detention order under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act") in respect of each applicant directing that he be detained at a place of detention for a period of two years. In some of the cases, the detention orders were extended for further periods of two years under s. 11A(1)(a)(aa) of the Act.

The first ground of challenge of the detention orders in these seven applications was the same as the second ground of challenge in the three applications above. It was argued that the Minister himself, and not the Deputy Minister, should have made the detention orders. This ground therefore also fails for the same reasons given above.

The second ground of challenge was that the respective reports of the circumstances of the arrest and detention of the applicants under s. 3(2)(c) of the Act were addressed to the Inspector-General of Police whereas they should have been addressed to the designated police officer.

Encik Noorbahri submitted that this was not material because it is general administrative procedure for letters intended for police headquarters at Bukit Aman to be addressed to the Inspector-General of Police. *Yeow Boon Kee v. Timbalan Menteri Dalam Negeri Malaysia & Anor.* [1993] 2 MLJ 359. Although the report was addressed to the Inspector-General of Police, the affidavit of the designated police officer clearly stated that the designated officer himself received the report and this was sufficient compliance with the requirement of s. 3(2)(c) of the Act for the circumstances of the arrest and detention to be reported to him.

I agree. It does not matter that the report is addressed to the Inspector-General of Police although intended for the designated police officer. This is because s. 3(2)(c) of the Act provides for the circumstances of the arrest and detention to be reported to either of those officers who in turn has to forthwith report the same to the Minister.

The Act recognises the fact that the Inspector-General of Police may not be able to personally deal with all the cases reported to him under s. 3(2)(c) of the Act and hence the provision in that section for him to designate a police officer to whom the reports can also be made.

Encik Karpal Singh, by way of example, referred to the report in the first of these seven applications which was addressed to the Inspector-General of Police. The affidavit of the reporting police officer and the report also show that it was made at 4.00 p.m. on 29 July 1991. The designated police officer affirmed that he (and not the Inspector-General of Police) received the report at 2. 15 the following morning. The words of L.C. Vohrah J. (as he then was) in *Yeow Boon Kee* at page 362 of the report are relevant in this context:

> ... The designated officer in each case has affirmed that he had received the report and had given due consideration to its contents and it was only after that that he submitted his report under the second limb to the minister. There is nothing in these provisions to suggest that the report must be addressed specifically to the designated officer. It is merely a matter of form that correspondence in government departments is normally addressed to the head of the department and this report conforms with this general administrative practice. In my view the important question to be determined is whether the designated officer did receive and apply his mind to the report and the answer to this question is positively in the affirmative as conceded by Mr. Karpal Singh. I am therefore satisfied that there has been compliance with the provisions of s. 3(2)(c) of the Act.

I similarly hold that there is no merit in this ground of challenge.

For the above reasons, I find that the applicants in these seven applications have also been legally detained under valid detention orders made by the Deputy Minister in the exercise of powers under s. 6(1) of the Act and that they have failed to establish that they are entitled in the circumstances to the issue of orders of *habeas corpus*.

These seven applications are accordingly dismissed.

Postlude

I have, in view of Encik Karpal Singh's exhortation that the main point of law raised in the three applications above has not arisen directly for adjudication before, taken steps to ensure that these grounds of judgment are made available immediately, although this has entailed my securing outside secretarial assistance as the same is presently not available to me in the office.